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DISTRICT IV

July 25, 2024

To:

Hon. Susan M. Crawford
Circuit Court Judge
Electronic Notice

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You are hereby notified that the Court has entered the following opinion and order:

2023AP593

William Stephen Lush, II v. Melanie Louise Stibick
(L.C. #2023CV174)

Before Kloppenburg, P.J., Blanchard, and Graham, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

William Stephen Lush, II, pro se, appeals a circuit court order dismissing all of his claims against the respondent, Michelle Schwartz. Based upon our review of the briefs and the record,

we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2021-22).¹ We summarily affirm.

Background

On January 23, 2023, Lush filed a complaint in the Dane County Circuit Court naming multiple defendants, including Schwartz. At all relevant times, Schwartz was employed as a housing manager for the Community Development Authority of the City of Madison. In the original complaint, Lush sought an injunction directing Schwartz to abate an alleged nuisance at the apartment complex where Lush resided.

Lush filed multiple amended complaints before the time period for filing a responsive pleading under WIS. STAT. § 802.06 had expired. Lush filed his first amended complaint on February 7, 2023, alleging that Schwartz had slandered him. The next day, Lush filed a second amended complaint adding allegations that Schwartz had abused process and invaded Lush's privacy. On February 27, 2023, Lush filed a third amended complaint in which he alleged that Schwartz intentionally caused him emotional distress.

On February 27, 2023, Schwartz and the City of Madison filed, in lieu of an answer, a motion to dismiss the third amended complaint, arguing that Lush failed to state a claim upon which relief could be granted. *See* WIS. STAT. § 802.06(2)(a)6. Schwartz and the City further argued in the motion that Lush failed to comply with the notice requirements for claims against public bodies and their employees under WIS. STAT. § 893.80(1d).

On March 23, 2023, Lush filed a notice of voluntary dismissal as to all of his claims against the City, as well as all claims against Schwartz, except for those claims alleging abuse of process

¹ All references to the Wisconsin Statutes are to the 2021-22 version.

and intentional infliction of emotional distress. On April 3, 2023, Lush filed a fourth amended complaint, which is the last amended complaint he filed in this case. In the fourth amended complaint, Lush did not include the City as a defendant.

On April 4, 2023, the circuit court issued an order dismissing all of Lush’s claims against the City, as well as Lush’s remaining two claims against Schwartz, the claims of abuse of process and intentional infliction of emotional distress. The court reviewed the original complaint, as well as all of the amended complaints, and concluded that Lush had failed in any of them to state a claim upon which relief could be granted. *See* WIS. STAT. § 802.06(2)(a)6. Lush appealed the dismissal order.

Discussion

“Whether a complaint states a claim upon which relief can be granted is a question of law for our independent review; however, we benefit from discussions of the ... circuit court.” *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶17, 356 Wis. 2d 665, 849 N.W.2d 693. As an initial matter, we note that the Wisconsin statutes governing civil procedure permit a party to amend a complaint only “once as a matter of course at any time within 6 months after the summons and complaint are filed[.]” WIS. STAT. § 802.09(1). After that, a party “may amend the pleading only by leave of court or by written consent of the adverse party[.]” Sec. 802.09(1). Lush does not assert, nor does the record establish, that he sought leave of the circuit court or consent from the defendants before filing multiple amended complaints. Nonetheless, the circuit court considered Lush’s original complaint, as well as all four of his amended complaints, in order to determine whether, as to those claims that Lush had not abandoned, he had stated claims for abuse of process and intentional infliction of emotional distress against Schwartz.

This court has also reviewed all five versions of Lush’s complaint, and we reach the independent conclusion that, as to the two claims that he has not abandoned, he has failed to state a claim upon which relief can be granted, and therefore the circuit court properly granted the motion to dismiss filed by Schwartz and the City.

“A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint.” *Data Key Partners*, 356 Wis. 2d 665, ¶19 (quoted source omitted). At the pleading stage, “[p]laintiffs must allege facts that plausibly suggest they are entitled to relief.” *Id.*, ¶31. When reviewing a motion to dismiss, “we accept as true all facts well-pleaded in the complaint and the reasonable inferences therefrom.” *Id.*, ¶19. “However, a court cannot add facts in the process of construing a complaint.” *Id.* To satisfy the requirements of WIS. STAT. § 802.02(1)(a), a complaint must plead facts that, if true, would entitle the plaintiff to relief. *Data Key Partners*, 356 Wis. 2d 665, ¶21. Bare legal conclusions “provide no assistance in warding off a motion to dismiss.” *Id.*

As noted above, Lush filed a notice of voluntarily dismissal as to all of his claims against the City, as well as all of his claims against Schwartz except for his claims for abuse of process and intentional infliction of emotional distress. Our attention is therefore necessarily limited to the two remaining claims against Schwartz.

The tort of abuse of process has two elements: (1) a willful act in the use of a legal process that is not proper in the regular conduct of the proceedings, and (2) subsequent misuse of the process. *Schmit v. Klumpyan*, 2003 WI App 107, ¶¶6-8, 264 Wis. 2d 414, 663 N.W.2d 331. A claim for intentional infliction of emotional distress has four elements: (1) the defendant intended to cause emotional distress by the defendant’s conduct; (2) the conduct was extreme and outrageous; (3) the “conduct was a cause-in-fact of the plaintiff’s emotional distress”; and (4) “the

plaintiff suffered an extreme disabling emotional response to the defendant’s conduct.” *Rabideau v. City of Racine*, 2001 WI 57, ¶33, 243 Wis. 2d 486, 627 N.W.2d 795.

Nowhere in the many iterations of the complaint does Lush allege specific facts, considered along with the reasonable inferences in favor of Lush that could arise from those facts, that, if proven in court, could support either of these two claims. In an entirely unclear manner, Lush merely alleges that Schwartz, at an unknown time and in an unknown way, “sen[t]” a police detective to Lush’s residence “in revenge for being serving [sic] process for failure to abate a nuisance which nuisance interfered with [Lush’s] quiet enjoyment of his home.”

We agree with Schwartz, who argues that Lush’s complaints “lack coherent allegations sufficient to establish the required elements of the claims whose labels he uses, in order to notify Schwartz of the purported legal and factual basis for the claims against her and enable her to prepare a defense.” Further, Lush has failed to file a reply brief responding to the arguments made in Schwartz’s respondent’s brief. Propositions asserted by a respondent on appeal and not disputed by the appellant in the reply brief are taken as admitted. See *Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994). Accordingly, the circuit court properly dismissed Lush’s two remaining claims against Schwartz. See WIS. STAT. § 802.06(2)(a)6.

As an alternative basis to affirm the circuit court ruling, Schwartz argues that this court should conclude that the operative complaint should be dismissed based on WIS. STAT. § 893.80. Specifically, Schwartz asserts that, because she is an employee of the city’s Community Development Authority, which is a public body, Lush was required to satisfy the notice requirements under § 893.80(1d) prior to initiating an action against her, but that he did not do so. The circuit court explicitly stated that it was not necessary to address this issue. Because we affirm the circuit court’s dismissal order on the basis that Lush failed to state a claim upon which relief

could be granted as to Schwartz, we need not address this alternative ground for dismissal. *See Barrows v. American Fam. Ins. Co.*, 2014 WI App 11, ¶9, 352 Wis. 2d 436, 842 N.W.2d 508 (2013) (“An appellate court need not address every issue raised by the parties when one issue is dispositive.”).

IT IS ORDERED that the order of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Samuel A. Christensen
Clerk of Court of Appeals